



ALAN WILSON
ATTORNEY GENERAL

September 4, 2015

The Honorable Ernest J. Moniz
Secretary
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585

Re: Savannah River Site: Mixed Oxide (MOX) Fuel Fabrication Facility

Dear Secretary Moniz:

Approximately 18 months ago, my office, with the support of our Congressional, State, and local representatives, filed a lawsuit on behalf of the State of South Carolina in response to the U.S. Department of Energy's (DOE) proposal to immediately suspend construction of the Mixed Oxide Fuel Fabrication Facility at the Savannah River Site (SRS) in Aiken County, South Carolina (MOX Facility or Project). If implemented, this "cold standby" proposal would have cost over 1,500 SRS workers their jobs and would have left the Nation without any viable path to dispose of 34 metric tons of dangerous weapons-grade plutonium. In addition to breaching its promise to the State of South Carolina, it also would have breached the United States' agreement with Russia for the disposition of 68 metric tons of weaponized plutonium, severely damaging the Nation's worldwide non-proliferation efforts. Fortunately, DOE quickly reversed course and an agreement was reached to jointly dismiss the litigation, with DOE continuing the Project. Congress subsequently affirmed the mandate for continued construction of the MOX Facility and appropriated funds specifically for that purpose for Fiscal Year 2015.

Nevertheless, I have watched with great concern over the last year and a half as the highest level advisors and senior administrative staffs at DOE and its National Nuclear Security Administration (NNSA) have continued to seek to terminate the MOX Project. Even more troubling, I have learned that the Department of Energy will attempt once again take action to halt construction of the MOX Facility despite its statutory obligations, international obligations, and the Congressional directive to continue construction, and further to do so without any viable alternative for the disposition or removal from South Carolina of the plutonium stored at SRS. I further understand that DOE officials have openly and repeatedly discounted DOE's statutory obligations to South Carolina.

I reiterate the importance of the MOX Facility and encourage you to carefully consider the commitments the United States has made to the State of South Carolina. I would appreciate your assurance that, despite all current indications, DOE will abide by its legal duties, Congressional directives, and meet its statutory obligations to South Carolina. Unfortunately, in light of DOE and NNSA actions and inactions, there is little confidence in the State that these legal obligations will be honored.

As you know, in furtherance of the United States' Plutonium Management and Disposition Agreement (PMDA) with Russia and consistent with DOE's recommendation following years of research studies, Congress enacted statutory provisions in 2002 governing the construction and operation of the MOX Facility at SRS.¹ South Carolina initially opposed building the MOX Facility at SRS based on the fear that DOE would not live up to its commitment and follow through with the MOX Project, thereby leaving the State as the indefinite resting place for large quantities of weaponized plutonium. However, DOE represented to the State and Congress that it was committed to both the MOX Project and a guaranteed pathway for the plutonium out of South Carolina. Still, recognizing the significant burden on and risk to South Carolina and its residents from long-term storage of weapons-grade plutonium, in enacting Section 2566, Congress imposed specific requirements and duties on DOE regarding the timely construction and operation of the MOX Facility and the expeditious removal of the plutonium from the State.² Congress also expressly recognized the economic benefit to South Carolina that would only be fully realized by completion and operation of the MOX Facility and, thus, statutorily mandated the provision of economic assistance to the State should DOE fail to meet its Section 2566 plutonium processing or removal obligations.³

Since the enactment of Section 2566, DOE has transferred significant quantities of weapons-grade plutonium to SRS and substantial progress has been made in construction of the MOX Facility. The now-70% complete facility has brought numerous businesses and workers to South Carolina and Georgia, and has had an enormous economic impact not only on the region but also the numerous other states in which MOX Facility contractors and subcontractors are based. Moreover, only a few years ago, the PMDA with Russia was amended to identify the MOX approach as the *only* option for plutonium disposition.

¹ See Bob Stump National Defense Authorization Act for Fiscal Year 2003 (NDAA FY03), Pub. L. No. 107-314, 116 Stat. 2458, Subtitle E, § 3181 ("The United States and the State of South Carolina have a compelling interest in the safe, proper, and efficient operation of the plutonium disposition facilities at the Savannah River Site."), § 3182, *subsequently codified by* the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392, as 50 U.S.C.A. § 2566 (Section 2566).

² See 50 U.S.C.A. § 2566(c)-(d); NDAA FY03, Subtitle E, § 3181 ("The State of South Carolina desires ... that the full benefits of the MOX facility are realized as soon as possible [and] that all defense plutonium or defense plutonium materials transferred to the Savannah River Site either be processed or be removed expeditiously.").

³ See NDAA FY03, Subtitle E, § 3181 ("[T]he MOX facility will also be economically beneficial to the State of South Carolina, and that economic benefit will not be fully realized unless the MOX facility is built.").

Despite this substantial progress and the critical role the MOX Facility plays in the Nation's worldwide non-proliferation efforts, DOE has seemingly turned its back on the Project over the last few years. Even before the "cold standby" proposal, DOE shifted its focus from the statutory mandate to "ensure that the MOX facility is capable of meeting the MOX production objective" to finding an alternative to the Project for plutonium disposition. However, to date, DOE has yet to find a better, feasible alternative to MOX and has instead only harmed the Project and the Nation by not making it a high priority and seeking the funding necessary to accomplish the mission. In fact, by intentionally "low-balling" the budget request the last several years, DOE intentionally created the current situation that funding is inadequate.

DOE also has disregarded the deadlines imposed by Section 2566 and ignored reporting obligations under the statute. Even the studies and reports commissioned by DOE have been intentionally biased and skewed against the MOX Project by DOE. For example, as stated by the South Carolina Congressional delegation in its letter dated August 21, 2015 and now-admitted by Aerospace Corporation representatives, the April 2015 "Plutonium Disposition Study Options Independent Phase 1 Report" conducted by Aerospace was *not* an independent analysis. Instead, it was driven by DOE and NNSA towards a conclusion adverse to the Project. Indeed, based on the highly questionable and radical assumptions relied on by Aerospace, the report appears not to be worth the paper it is written on, let alone the taxpayer dollars DOE spent on it.

Moreover, the "Red Team" report commissioned by DOE, despite confirming that the Aerospace report's cost analysis is baseless, suffers from the same obvious bias against the Project. For instance, it simply strains credulity to believe that, for purposes of their technical analysis, a group of objective nuclear scientists and engineers would find it necessary to cite to and emphasize on multiple occasions a political quote from the New Mexico Governor regarding the importance of the Waste Isolation Pilot Plant (WIPP) in New Mexico, which just happens to be a critical component of the supposed alternative to MOX.⁴ Indeed, relying on this quote and several unsupported assumptions, the Red Team completely discounts the difficulties and roadblocks to the proposed alternative to MOX, including the fact that WIPP is currently closed due to a fire and a radiation leak that resulted in DOE paying \$73 million to settle the corresponding fines levied by New Mexico and that there is absolutely no guarantee WIPP will open any time in the near future. The Red Team report makes assumptions on political and policy issues that lack all credibility—such as the supposed ease with which Russia would agree to amend the PMDA. If this was in fact the level of analysis undertaken by the Red Team and it was not influenced by DOE, then surely it would have included and relied on one of the myriad quotes from Governor Haley or members of South Carolina's Congressional delegation about the importance of the MOX Facility to South Carolina, the Nation, and the world. At bottom, neither of the recent studies commissioned by DOE provides any reasonable support for DOE's apparent goal of shutting down the MOX Project.

⁴ Interestingly, this *N.Y. Times* article quoted so prominently by the Red Team was dated August 8, 2015—three days after the draft of the report was circulated and only two days before it was formally due to DOE.

DOE has obligations under federal law to the Nation and the State of South Carolina. As discussed, DOE's actions over the past few years demonstrate that it does not view these obligations, especially those to South Carolina, as the legally binding requirements that they are. These actions also lead to the conclusion that DOE is again planning to shut down the Project regardless of DOE's statutory duties, international obligations, or whether there is any viable alternative for disposition and removal from South Carolina of the plutonium stored at SRS. Once again, we witness the Federal Government failing to follow the law.

In light of DOE's actions, please accept this letter as notice of potential litigation and document preservation notice. DOE and NNSA should take affirmative steps to ensure that documents regarding the Project for the past five year are maintained. These documents include internal DOE and NNSA communications, documents related to the DOE's budget requests, and all communications with Aerospace and the Red Team.

If DOE would like to discuss a path forward that preserves the Project and avoids litigation, please do not hesitate to contact me. Thank you.

Sincerely,



Alan Wilson
Attorney General

cc: South Carolina Congressional Delegation
The Honorable Nikki R. Haley
The Honorable Hugh K. Leatherman, Sr.
The Honorable James H. "Jay" Lucas
The South Carolina Aiken County Legislative Delegation